Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States
October Term, 1995

Arthur A. Blumeyer, III and John W. Peckham. Jr.,
Petitioners

v.

United States of America,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

Joint Petition for Writ of Certiorari

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60 pp

QUESTION PRESENTED FOR REVIEW

I.

Whether the Court of Appeals erred in refusing to follow this Court's decision in Remmer v. United States, 347 U.S. 227 (1954), by refusing to apply a presumption of prejudice to a case of extrinsic juror misconduct distinguishing factual from legal misconduct in violation of the Fifth and Sixth Amendment? There is a split of authority between and within the circuits and confusion as to the tests to be applied to legal versus factual misconduct and as to extrinsic juror misconduct versus juror bias which requires clarification by this court.

II.

Whether the Court of Appeals disregarded the established rule of judicial review in failing to apply the abuse of discretion standard to the district court factual findings by (1) misconstruing Rule 606(b) FRE and (2) then engaging in de novo fact finding?

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The parties before the Supreme Court and the parties to the proceedings below are identical, except that the Solicitor General was not involved in the proceedings below.

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OPINIONS BELOW

The original appellate opinion, by a divided panel of the Eighth Circuit, reversed the decision of the district court granting petitioners a new trial and reinstated the jury verdicts and is reported at 62 F. 3d 1013. The Order of the Eighth Circuit denying petitioners' petition for rehearing was entered on October 11, 1995. The opinion and order are reproduced in the appendix attached hereto.

JURISDICTION

The panel opinion reversing the district court's grant of a new trial was entered on August 4, 1995. Appellants Blumeyer and Peckham timely petitioned for rehearing, with suggestions for rehearing en banc. The petition was denied on October 11, 1995. Upon motion by petitioners the mandate of the Court of Appeals was stayed pending this Petition for Writ of Certiorari. This petition for certiorari was filed with the Clerk of this Court within ninety (90) days after entry of the Court of Appeals' judgment and is timely. Supreme Court Rule 13.1.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No issue is raised as to the constitutionality of any statute.

U.S. Const. amend. V:

"No person . . . shall be . . . deprived of life,

liberty, or property, without due process of law . . ."

U.S. Const. amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury . . ."

Fed R. Evid. 606(b):

"Upon an inquiry into the validity of a verdict. . ., a juror may not testify as to any matter of statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. . ."

STATEMENT OF THE CASE

Defendants Arthur A. Blumeyer, III and John W. Peckham, Jr. were indicted on March 17, 1993, in the Eastern District of Missouri, on multiple counts of wire fraud, mail fraud, conspiracy to commit wire and mail fraud, and money laundering in violation of Title 18, United States Code, Sections 1341, 1343, 1956, 1957 and 371. Indicted with defendants and found not guilty were Dewey G. Crump, Marvin Lewis and W.G. King.

Jury trial commenced on January 4, 1994. On February 4, 1994, the jury found defendants Blumeyer and Peckham guilty on some charges and not guilty on others.

On the day after the verdicts, Juror #9, on her own initiative, contacted John Peckham concerning her regret about the verdicts against him. Mr. Peckham quite properly referred her to his counsel. This juror was unable to reach Peckham's counsel and recontacted Mr. Peckham. On Monday, February 7th, the juror contacted Peckham' counsel in his office and he informed her that he could not speak with her except under the court's supervision (Rule 16 D E.D. Mo.). Peckham's counsel immediately informed the court of this contact and notified one of the Assistant United States Attorneys who had prosecuted the case.

The court then conducted an in-camera interview of the juror on February 15, 1994. During this interview, with the court's permission, Peckham's counsel asked the juror a general question as to extrinsic misconduct [Tr. 2/15/94 p. 11]. There was no objection to the question by the government. Indeed, the government itself proceeded to ask follow-up questions in this same area [Tr. 2/15194 p. 13-15]. Juror #9 responded to Peckham's counsel's inquiry that the

Foreperson had announced in the jury room that he had posed a question to an attorney concerning the conspiracy charges. Several jurors responded that the Foreperson's contact with the attorney was improper. The testimony of Juror #9 contained in pages 11 and 12 of the February 15, 1994 in camera interview makes it clear that the conversation that the Foreperson related to having had with an attorney involved what kind of evidence it would take to be sufficient to find an individual guilty of having conspired with another. The district court specifically found that Juror #9 was a credible source and that she had alleged potentially serious misconduct by the Foreperson.

The court then granted, in part, defendant Peckham's Motion For Leave To Interview Petit Jurors, over the objection of the government. The Foreperson and nine of the remaining jurors were interviewed individually in chambers on June 10, 1994. The remaining juror who was unavailable on that date was interviewed June 21, 1994.

The first juror interviewed was the Foreperson. When asked the direct question of whether he had conversations with attorneys, he denied having had any conversations about the case. However, Jurors #3, #4, #10, #11 and #12 corroborated Juror #9's statement that the Foreperson had mentioned during deliberations that he had talked with an attorney. Several of these jurors believed that the Foreperson had made such a comment early in the deliberations perhaps on the first or second day. Juror #4 stated that the Foreperson had told fellow jurors that he had called a friend to talk about the case under submission. (Tr. 6/10/94 p.12) This juror believed that the person improperly contacted was a lawyer. This juror specifically recalled that the matters the Foreperson discussed were about something in the case. (Tr. p.13 and 14)

The jurors then gave their best recollection of the conversation the Foreperson related. The conversation had to do with the start up of a business and the proper use of working capital and whether that would be legal or illegal. In all a total of six (6) jurors specifically recalled that the Foreperson had told them during the period of jury deliberations that he had spoken with an attorney with regard to the case. (Tr. 2/15/94 p.11-12; Tr. 3/10/94 p.ll, 12-16, 23-27, 28; Tr. 3/21/94 p.36-38) A total of five (5) jurors characterized the Foreperson as having posed a hypothetical question to an attorney about the case. Three of the jurors recalled that one or more members of the jury admonished the Foreperson for speaking with an attorney about the case. Juror #11 testified that she told the foreperson "I thought we weren't supposed to discuss this outside of the deliberation, outside of the fellow jurors." And he said "I realize that. I'm just asking a question to an attorney, for some information." (Tr. 6/10/94 p.26).

The district court subsequently recalled the Foreperson for further questioning about his improper conduct. The Foreperson again initially denied having made any comments to his fellow jurors about conversations with attorneys during the deliberation period. (Tr. 7/21/94 p.8-9) But upon further questioning, the Foreperson stated that he had spoken with an attorney about his rights, obligations and liabilities as a jurist and potential foreman (Tr. 7/21/94 p. 9). Contrary to the testimony of five (5) of his fellow jurors he denied having posed a hypothetical question to an attorney about the issues in the case.

The essential finding of fact by the district court was as follows:

"The Court finds an irreconcilable discrepancy

between the testimony of the Foreperson on the one hand and Jurors #4, #9, #10 and #11 on the other. These four jurors recall the Foreperson stating that he had discussed the case with an attorney. Two jurors testified that the conversation pertained to substantive issues (conspiracy and working capital), which the Foreperson denied. Five jurors recalled that the Foreperson posed a hypothetical question to a lawyer, which he denied. The Court simply cannot believe that several members of the jury panel misunderstood the Foreperson to be posing a hypothetical question to a lawyer about the case, when in fact he only sought general information on his roles as a juror and foreperson. Based on the totality of the testimony, the Court finds that the Foreperson posed a hypothetical question to an attorney about substantive issues in the case".

REASONS FOR GRANTING THE WRIT

ARGUMENT

After an investigation into reported juror misconduct, the district court found that the jury foreperson had posed a question to an attorney about substantive issues in this case and shared the information with other jurors during deliberations. In granting petitioners a new trial, the district court followed this Court's decision in Remmer v. United States, 350 U.S. 377 (1956) that a presumption of prejudice applies when a juror communicates with anyone about the case outside of jury deliberations. In declining to apply the presumption of prejudice mandated by Remmer, the Eighth Circuit Court of Appeals adds to the confusion as to Remmer's precedential value - a subject on which there is a split of authority between circuits and an *intra*-circuit split in both the Ninth and Eleventh Circuits.

In addition, the majority adopted an approach that fails to give deference to the decision of a trial court to grant a defendant a new trial, but which purports to do so. The majority adopted an erroneous interpretation of Federal Rule of Evidence 606(b) which denies the district court discretion to consider juror testimony concerning deliberations for the limited purpose of determining whether extraneous prejudicial information has been brought to the attention of the jury. Furthermore, the majority disregarded the findings of the district court and re-evaluated the evidence of juror misconduct in order to make *de novo* findings as to its prejudicial effect and as to whether it bore on substantive issues in the case. The approach of the majority raises substantial questions as to whether district courts retain actual discretion to inquire into juror misconduct and to remedy it by granting a new trial.

I.

The district court ordered new trials for petitioners based on its investigation of extrinsic juror misconduct which came to light subsequent to the entry of the jury verdicts. Prior to ordering new trials, the district court conducted in camera on the record interviews of all jurors in the presence of attorneys for the parties. After briefing by the parties, the district judge made factual findings, as part of a 20 page memorandum and order entered on August 30, 1994, that the jury foreperson had posed a hypothetical question to an attorney about substantive issues in the case and that the foreperson had attempted to share the information that he had gained with his fellow jurors during jury deliberations.

In ordering the new trial, the district court, following this Court's holdings in Remmer, found that a presumption of prejudice arose and that the government had failed to rebut it. Remmer v. United States, 347 U.S. 227 (1954); Remmer v. United States, 350 U.S. 377 (1956).

In Remmer, this Court reaffirmed the rule of a presumption of prejudice recognized in cases of this Court as far back as Maddox v. United States, 146 U.S. 140, 148-50 (1892).

> "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about a matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and in the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive,

> but the burden rest heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant."

The practical need for the application of this presumption of prejudice stems from several sources including the fact that a juror or non-juror involved in extraneous misconduct will often be a recalcitrant witnesses; United States v. Brantley, 733 F.3d 1429, 1440 (11th Cir. 1984) see also Smith v. Phillips, 455 U.S. 209, 221-222 (1982); and the limited scope of inquiry permissible under Rule 606(b) Fed.R.Evid.

In reversing the district court's granting of a new trial, the court of appeals refused to apply the presumption of prejudice required by Remmer. While the district court had found that the extrinsic information obtained by the foreperson could not clearly be classified as either factual or legal in nature, the court of appeals claimed the extrinsic information related to legal issues, that the presumption of prejudice did not apply and that it was petitioners' burden to produce evidence not barred by Rule 606(b) sufficient to prove actual prejudice in order to justify a new trial. U.S. v. Blumeyer, 62 F.3d 1013, 1015-1017 (8th Cir. 1995) citing United States v. Cheyenne, 855 F.2d 566 (8th Cir. 1988) and United States v. Estrada, 45 F.3d 1215 (8th Cir. 1995) (certiorari granted, vacated and remanded No. 94-8972 December 11, 1995).

The Cheyenne and Estrada decisions are merely representative of opinions from a number of circuits which either refused to apply the Remmer presumption, attempt to distinguish themselves from Remmer, or assert that this Court's subsequent decisions in Smith v. Phillips, and

Rushen v. Spain have modified the holding of Remmer. Smith v. Phillips, 455 U.S. 209 (1982); Rushen v. Spain, 464 U.S. 114 (1983). Smith was a habeas review of the state court conviction involving a claim of juror bias, not extrinsic misconduct discovered subsequent to the return of a jury's verdict. Bias cases involve a different standard than extrinsic misconduct cases requiring a party to establish actual bias on the part of a juror. Rushen was likewise a habeas review of the state court conviction and did not involve any claim of extrinsic misconduct but rather addressed an ex parte communication between a juror and the trial court. The movant was given the opportunity to establish some impropriety in this contact and failed to do so.

The Sixth and First Circuits have seemingly declined to follow this Court's holding in Remmer. In United States v. Pennell, the Sixth Circuit held that Remmer governed the circumstances under which a hearing should be granted and the scope and purpose of that hearing but that after this Court's decision in Smith, prejudice was not to be presumed in all cases of extraneous communications. United States v. Pennell, 737 F.2d 521, 532 (6th Cir.), cert. denied 469 U.S. 1158 (1985). See also United States v. Rugiero, 20 F.3d 1387, 1390-91 (6th Cir.), cert. denied 115 S.Ct. 208 (1994); United States v. Walker, 1 F.3d 423, 431 (6th Cir. 1993).

The First Circuit likewise refused to apply the Remmer presumption to cases which are in any way distinguishable from the specific facts of Remmer. United States v. Boylan, 898 F.2d 230, 259-260 (1st Cir.) cert. denied 498 U.S. 849 (1990); Neron v. Tierney, 841 F.2d 1197, 1200 (1st Cir.), cert. denied 488 U.S. 832 (1988).

Both the Ninth and Eleventh Circuits have intra circuit splits as to the precedential value of Remmer. United

States v. Martinez, 14 F.3d 543, 550 at n.3 (11th Cir. 1994) (discussing the conflict in the circuits' prior decisions as to whether a presumption of prejudice arises or whether a defendant must demonstrate actual prejudice); United States v. Rowe, 906 F.2d 654, 656 (11th Cir. 1990) (no presumption of prejudice applied). Likewise within the Ninth Circuit there are seemingly irreconcilable decisions. United States v. Madrid, 842 F.2d 1090, 1093 (9th Cir.), cert. denied 488 U.S. 912 (1988) and United States v. Endicott,869 F.2d 452, 457 (9th Cir. 1989) (defendant must show actual prejudice); United States v. Littlefield, 752 F.2d 1429, 1431 (9th Cir. 1985) (applying the presumption of prejudice).

Much of the confusion in these cases results from a failure to distinguish between extrinsic juror misconduct coming to the court or the parties' attention subsequent to the return of a verdict from cases involving juror bias or misconduct discovered during the course of the trial and inquired into, prior to the conclusion of the deliberations. Rule 606(b) Fed.R.Evid. is inapplicable to matters of juror bias misconduct and other forms of prejudice coming to the court's attention during trial. Wright & Gold, Federal Practice and Procedure: Evidence §6074. Rule 606(b) is clearly applicable in cases, such as the present one, where misconduct is discovered subsequent to the return of the verdict.

Additional confusion stems from the attempt to characterize extraneous information as being factual or legal in nature. This distinction is arbitrary at best and is at odds with this Court's decision in Remmer. The attempt to limit the presumption of prejudice to only those cases in which extraneous information relates to factual matters at issue in the case, overlooks the principal that an accused is entitled to

the verdict of a jury without extraneous unknown information invading the jury room. Remmer itself did not involve factual matters at issue in the case but rather an ex parte contact with a juror. If an oblique hint of a bribe is sufficient to invoke a presumption of prejudice, surely a jury foreperson's consultation with an attorney through the use of hypothetical examples warrants a similar result.

The body of law among the courts of appeals is in a state of chaos with regard to the analysis to be applied in cases of extrinsic juror misconduct. Such issues arise frequently enough to warrant this Court's review and guidance. The continued viability of our justice system depends on the public's continued perception that a litigant will receive a verdict rendered by a jury which has not been tainted by extrinsic contact.

II.

In this case, the Eighth Circuit Court of Appeals has adopted an approach that fails to give deference to the decision of a trial court judge to grant a defendant a new trial based on juror misconduct, but which purports to do so. Here the Eighth Circuit Court of Appeals panel recited that it would overturn the decision of the trial court granting petitioners a new trial only if it was clearly erroneous, but then proceeded to reweigh the evidence before the trial court and make its own independent findings on matters determined by the trial court judge.

Numerous courts, including the Eighth Circuit Court of Appeals have recognized that the nature of a trial court's inquiry into juror misconduct dictates that the decision to a grant a new trial on the grounds of juror misconduct should be treated with deference. See, e.g. United States v. Sanders, 962 F.2d 660, 669 (7th Cir. 1992)(in an extraneous information case, the court "shall reverse the district court's decision only if we have a very strong conviction of error."); Cheyenne, 855 F.2d at 568 (8th Cir.)(purporting to give "substantial weight to the trial court's appraisal of the prejudicial effects of extraneous information on the jury."); United States v. Bagnariol, 665 F.2d 877, 885 (9th Cir. 1981)(The trial court judge's "conclusion about the effect of the alleged juror misconduct deserves substantial weight."). The approach adopted here by the Eighth Circuit Court of Appeals raises the question of whether the stated standard of review of these trial court decisions need actually be applied by appellate courts, or merely recited and then circumvented.

In a case involving juror misconduct, the trial court judge may consider juror testimony for the purpose of ascertaining juror exposure to extraneous prejudicial

information, but he may not consider testimony as to the subjective effect of the information on the jurors. F.R.E. 606(b). This inquiry requires that appellate courts grant trial courts discretion in determining the "fine line between 'subjective' and 'objective' matters." United States v. Boylan 898 F.2d 230, 259-60 (1st Cir. 1990).

Here, the Eighth Circuit Court of Appeals adopts a rule that deprives a trial court judge of the discretion to consider testimony about deliberations for the limited purpose of determining whether extraneous prejudicial information was brought to the attention of the jury. In this case, Juror 9 testified that during deliberations on the conspiracy counts, the jury foreman related a conversation that the foreman had with an attorney concerning the subject upon which the jurors were deliberating. (See order).

The district court judge found that this and other juror testimony "suggests that the Foreperson questioned a lawyer about substantive legal issues (perhaps conspiracy and/or working capital) which were material to the Defendants' guilt or innocence." (Memorandum and Order, App. 30). With regard to Juror 9's testimony suggesting that the foreman related extrinsic information related to the conspiracy charges, the majority held that the district court judge had abused her discretion by drawing "inferences regarding the subject of the foreman's inquiry from the discussion occurring in the jury room at the time the foreman revealed his improper contact." United States v. Blumeyer, 62 F 3d 1013, 1014, n. 1 (8th Cir. 1995).

Juror 9's testimony revealed the nature of the extraneous information by identifying the context in which it was related to the jury and was properly considered for that purpose by the trial court. Blumeyer, 62 F. 3d at 1018 n.1

(Henley, J., dissenting). The majority draws an arbitrary distinction between juror testimony in which the nature of extraneous information is directly identified and juror testimony which identifies a subject of deliberations and then indicates that the extraneous information related to the same subject.

Such a rule conflicts with the approach of other circuits which allow consideration of juror testimony concerning matters otherwise inadmissible under 606(b) for the limited purpose of determining whether an extraneous contact has been brought to the jury's attention. See, United States v. Boney, 68 F.3d 497 (D.C. Cir. 1995); United States v. Bruscino, 662 F.2d 450, 459 *rev'd on other grounds*, 687 F.2d 938 (7th Cir. 1982). In declining to follow the approach of other circuits on this issue, the majority severely limits the discretion of trial court judges to make inquiry into juror misconduct which is necessary to determine if a defendant has been prejudiced by extraneous information. The Eighth Circuit's approach violates the standards established by this Court and deprives defendants of their Sixth Amendment right to trial by jury.

The analysis of the majority went on to make *de novo* determinations that conflict with the findings of the district court judge. The circuit court refused to consider evidence that extraneous information concerning conspiracy was brought to the jury's attention. Furthermore, the majority discounted the district court's finding that extraneous information concerning working capital was brought to the attention of the jury which information bore on substantive issues in the case. As the district court judge was doubtlessly aware, the indictment alleged that as part of a scheme to defraud misrepresentations were made that the capitalization of an insurance company complied with state requirements.

However, after improperly re-weighing the evidence, the majority concluded that "there is no evidence to support the District Court's finding of an extrinsic contact on a substantive matter in the case, either legal or factual." 62 F.3d at 1016.

The panel also revisited the trial court's determination that the government had failed to rebut its presumption of prejudice. While conceding that the district court order correctly stated the factors relevant for determining whether the presumption was rebutted (including the weight of evidence of the defendants' guilt), the panel "reviewed the record" and concluded that evidence of petitioners' guilt was overwhelming and that the government had rebutted the presumption of prejudice. 62 F. 3d at 1018. Finally, the majority made a *de novo* determination that the petitioners had not suffered actual prejudice. Given the proper role of the trial court in making this determination, this issue should have been remanded to the trial court. See, 62 F.3d at 1020 (Henley, J., dissenting).

Clarification from this Court is needed to establish the role of deference to the trial court in cases in this procedural posture. Prior to the 1984 amendment of 18 U.S.C. § 3731, the government was not able to bring an interlocutory appeal of a trial court's grant of a new trial based on juror misconduct. Pub.L. 98-473, Title II, §§ 205, 1206, 98 Stat. 1986, 2153 (1984). Under the previous statutory scheme, the appellate court would have had no jurisdiction to make this evaluation. Following the decision of the trial court judge to grant a new trial, a trial would have been afforded petitioners and the evidence of their guilt would have been evaluated by a jury not tainted by misconduct. The approach adopted by the majority, in effect, substitutes the judgment of judges who did not preside at trial for the judgment of the

trial court and the jury. The approach of the majority in this case, which comes to its own evaluation of the evidence of the petitioners' guilt, demonstrates the need for this clarification. This approach ignores the fact that trial court judges are more qualified to make the decision of whether juror misconduct warrants a new trial because they are aware of the defense asserted and evidence produced at trial. Bagnariol, 665 F.2d at 885.

Review of the appellate cases involving extraneous information reveals that the abuse of discretion standard is applied scrupulously in cases in which the trial court has denied a defendant a new trial. Petitioners can only speculate as to why the majority has adopted an approach that abandons this standard of review without acknowledging that it does so. The fact that this approach differs so markedly with the approach followed in cases in which a denial of a new trial is affirmed suggests that perhaps the approach of the majority is a result-oriented one that unconstitutionally subordinates the rights of defendants to a proper jury trial to other factors. In any event, the approach of the majority threatens to lead to a jurisprudence in which stated standards of review are not applied.

CONCLUSION

Wherefore, for the foregoing reasons, petitioners, Arthur A. Blumeyer, Jr., and John W. Peckham, Jr. respectfully request that the Honorable Court grant certiorari to review the panel ruling of the Eighth Circuit and, upon such review, affirm the order of the district court granting defendants a new trial.

Respectfully submitted

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APPENDIX A

UNITED STATES of America, Appellant,
v.

Arthur A. BLUMEYER, III, and John W. Peckham, Jr., Appellees.

No. 94-3671.
United States Court of Appeals,
Eighth Circuit.
Submitted May 16, 1995.
Decided Aug. 4, 1995.
Rehearing and Suggestions for
Rehearing En Banc Denied
Oct. 11, 1995. [FN*]

FN* McMillian and Beam, Circuit Judges, would grant the suggestions for rehearing en banc.

Following jury trial, defendants were convicted of wire fraud, mail fraud, and conspiracy, and one defendant was convicted of money laundering. The United States District Court for the Eastern District of Missouri, Jean C. Hamilton, Chief Judge, granted new trial, and government appealed. The Court of Appeals, Bowman, Circuit Judge, held that: (1) defendants were not entitled to presumption of prejudice based on jury foreperson's contact with outside attorney; (2) defendants failed to show actual prejudice arising from contact; and (3) even if presumption of prejudice arose, government rebutted that presumption.
Reversed, jury verdicts reinstated, and remanded.
Henley, Senior Circuit Judge, filed dissenting opinion.

Audrey Goldstein Fleissing, St. Louis, MO, argued, for

appellant. In addition the names of Edward L. Dowd, Jr. (as U.S. Atty.), and Patricia A. McGarry, St. Louis, MO, appear on the brief of the appellant.

Lee Lawless, St. Louis, MO, argued, for appellee Peckham.

N. Stephen Marshall, St. Louis, MO, for appellee Blumeyer.

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

BOWMAN, Circuit Judge.

The United States appeals an order of the District Court granting a new trial to Arthur Blumeyer and John Peckham on the basis of a juror's misconduct. We reverse, reinstate the jury's verdicts, and remand for sentencing.

After a four-week trial ending in six days of deliberations, a jury convicted Blumeyer and Peckham of wire fraud in violation of 18 U.S.C. s 1343 (1988), mail fraud in violation of 18 U.S.C. s 1341, and conspiracy to commit wire fraud and mail fraud in violation of 18 U.S.C. s 371. The jury also convicted Blumeyer of multiple counts of money laundering in violation of 18 U.S.C. s 1956. Upon the request of both defendants, the District Court conducted a poll of jurors. All of the jurors confirmed the verdicts. Juror 9, however, "paused for a long moment before announcing her agreement with the verdicts against Mr. Peckham, and she appeared close to tears," but "she clearly stated that the announced convictions were her 'true and correct' verdicts." United States v. Blumeyer, No. 4:93CR68, Mem. & Order at 3 (E.D.Mo. Aug. 30, 1994) (Mem. & Order).

[1][2] The following day Juror 9 called Peckham to tell him that she regretted the verdicts against him. Peckham asked Juror 9 to contact his attorney, and Peckham's attorney notified the District Court of Juror 9's communications. On February 15, 1994, the court interviewed Juror 9. During the interview, Peckham's attorney asked Juror 9 whether any juror had consulted an outside source during the deliberations. Juror 9 said that the jury foreman had asked "an attorney friend of his, just on a question of law" and that the foreman mentioned the contact in the context of a discussion among the jurors. [1]
Sealed Transcript of Feb. 15, 1994, Interview at 12. She could not remember what the foreman had said about the contact and noted, "I didn't pay a lot of attention to him anyway." Id. Juror 9 also said that when the foreman started discussing his contact with an attorney some of the

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[1] Blumeyer and Peckham, along with the District Court, draw inferences regarding the subject of the foreman's inquiry from the discussion occurring in the jury room at the time the foreman revealed his improper contact. Juror 9's testimony regarding that discussion clearly falls within the proscription of Federal Rule of Evidence 606(b). Rule 606(b) bars the use of testimony concerning a juror's mental process, and we will not consider the portions of Juror 9's testimony that describe her mental process or the deliberations of other jurors. Evidentiary decisions of a district court ordinarily will not be disturbed unless the decision constitutes an abuse of discretion. United States v. Ballew, 40 F.3d 936, 941 (8th Cir.1994), cert. denied, --- U.S. ----, 115 S.Ct. 1813, 131 L.Ed.2d 737 (1995). To the extent that the District Court used testimony barred by Rule 606(b) to make its findings of fact, the court abused its discretion.

jurors were getting coffee and not listening to the foreman. Additionally, some of the jurors who were listening were apparently upset by the foreman's contact with an attorney and admonished the foreman for violating the District Court's instructions. Based on this interview the District Court granted Peckham's motion for leave to interview the other petit jurors.

Jurors 10, 11, and 12 largely corroborated Juror 9's statements regarding the foreman's contact with an attorney. Like Juror 9, they did not remember the subject of the question the foreman said he had posed. Juror 4's memory of the foreman's statement was similar to that of Jurors 10, 11, and 12 except that she believed that the comment related to the legality of starting a corporation with insufficient capital. Juror 4, however, also said at least ten times that she really couldn't remember the subject of the question. In response to a query from the court regarding the level of her certainty, she replied, "I'm uncertain about what it was that [the foreman] checked on [with the attorney]." Sealed Transcript of June 10, 1994 Hearing at 14. Jurors 4 and 11 described the subject of the foreman's conversation with the attorney as a "hypothetical question" or "things in general ... [n]ot specific to the case." Id. at 26, 15. Juror 3, while recalling that the foreman mentioned a conversation with an attorney, could not remember whether the foreman's comment related to the case at all. Jurors 1, 2, 5, 6, and 8 did not remember the foreman discussing a conversation with an attorney at any time during the deliberations. The court interviewed the foreman on two separate occasions, and the foreman denied having discussed with an attorney any of the substantive issues in the case, either directly or through hypothetical questions.

[3][4] After interviewing all of the jurors, the court

found "the Foreperson posed a hypothetical question to an attorney about substantive issues in the case" that "were material to Defendant's guilt or innocence." Mem. & Order at 10, 15. The court declined to characterize the "substantive issues" as either legal or factual. Id. at 13 n. 4. The court further found that the admonitions of the other jurors "prevented the Foreperson from relating fully the information he had received." Id. at 10. Based on these findings, the court held that the law required it to presume that the contact was prejudicial to the defendants. Id. at 13. The court concluded that the government had not rebutted the presumption and granted Blumeyer's and Peckham's motions for a new trial. We will reverse a district court's decision to grant a new trial only when that decision constitutes an abuse of discretion. United States v. Estrada, 45 F.3d 1215, 1225 (8th Cir.1995), petition for cert. filed, No. 94-8972 (April 24, 1995). A discretionary decision based on a clearly erroneous finding of fact constitutes an abuse of the trial court's discretion. Waible v. McDonald's Corp., 935 F.2d 924, 926 (8th Cir.1991) (per curiam).

[5] The District Court's order relies on Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954), and United States v. Bassler, 651 F.2d 600, 603 (8th Cir.), cert. denied, 454 U.S. 944, 102 S.Ct. 485, 70 L.Ed.2d 254 (1981), and cert. denied, 454 U.S. 1151, 102 S.Ct. 1018, 71 L.Ed.2d 305 (1982), as authority for imposing the rebuttable presumption of prejudice in ***1016** this case. In Remmer, the Supreme Court stated that [i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial.... The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing

of the defendant, that such contact with the juror was harmless to the defendant. Remmer, 347 U.S. at 229, 74 S.Ct. at 451. The presumption of prejudice does not apply unless the extrinsic contact relates to "factual evidence not developed at trial." United States v. Cheyenne, 855 F.2d 566, 568 (8th Cir.1988). Extrinsic contacts that relate to the facts of a case are presumptively prejudicial "because the jury is the final arbiter of factual disputes."Id.

[6] The government argues that in this case there is no evidence to support the District Court's finding of an extrinsic contact on a substantive matter in the case, either factual or legal. We agree. The juror interviews revealed absolutely nothing that would warrant a finding that the improper contact between the foreman and an attorney related to a substantive issue in the case. It is telling that the District Court made no firm finding of fact regarding the subject matter of the hypothetical question posed to the attorney. At most, the testimony of the jurors tends to show that the foreman contacted an attorney and asked a hypothetical question about something. One juror described the question as a question of law. The District Court's finding that "the Foreperson posed a hypothetical question to an attorney about substantive issues in the case," is unsupported by the testimony of the jurors, which is the only evidence in the record on this issue. We hold that the court's finding is clearly erroneous, and thus the factual predicate necessary for the court to presume prejudice was absent.

[7] Even if the extrinsic contact related to a substantive issue in the case, the government argues that the improper contact concerned only a point of law. In response to the government's argument, Blumeyer and Peckham argue that the "use of the labels 'legal' or 'factual' is not helpful"

in determining whether an extraneous contact is presumptively prejudicial. Blumeyer's Brief at 31; Peckham's Brief at 33. This Court, however, has found the distinction between factual and legal issues to be legally significant as well as helpful. See Cheyenne, 855 F.2d at 568. The District Court recognized that Cheyenne supports the government's position, Mem. & Order at 13 n. 4, but refused to apply Cheyenne because the court disagreed with this Court's reasoning in that decision. We are bound, as is the District Court, by the prior decisions of this Court, United States v. Rodamaker, 56 F.3d 898, 903 (8th Cir.1995), and we must either apply Cheyenne or distinguish it from the instant case. We agree with the government that Cheyenne applies to this case.

The government argues that the only available evidence of the foreman's improper contact with an attorney shows that the contact related to a question, or questions, of law. Blumeyer and Peckham, on the other hand, contend that the extrinsic contact relates to factual issues to be decided by the jury and, therefore, forms the proper predicate for the invocation of the presumption of prejudice. They cite the District Court's finding that the contact related to "substantive issues in the case," Mem. & Order at 13, in support of their argument that the contact was related to factual issues. We note, however, that the District Court specifically refused to "classify the extrinsic information obtained by the Foreperson as clearly factual or legal in nature." Mem. & Order at 13 n. 4.

[8] Having reviewed the record, we conclude that the only evidence of the extraneous information presented to the jury clearly indicates that the information, if it related at all to a substantive issue in the case, related to a point of law. In Cheyenne a juror consulted a dictionary to clarify words

used in the trial court's instructions. Cheyenne, 855 F.2d at 567. This Court noted that not *1017 all of the jurors were aware of the presence of the dictionary. Id. We held that the extraneous information obtained by the jury was not prejudicial because it related to the definition of a legal term rather than "the facts under deliberation," and because the use of the dictionary did "not involve a jury's improper consideration of material bearing on the defendant or the acts alleged in the indictment." Id. at 568. In the instant case, the information obtained from the attorney also did not bear on the defendant or on the acts alleged in the indictment. The record contains no evidence that would tend to show that the attorney consulted by the foreman had any knowledge of the defendants or the crimes charged in the indictment. Even viewed in the light most favorable to Blumeyer and Peckham, the testimony of the various jurors shows only that the foreman's question was intended to clarify a point of law, much as the juror's use of the dictionary in Cheyenne was intended to clarify the trial court's legal instructions. Any question regarding the minimum start-up-capital requirements for corporations was a question that the jury was not required to answer to reach its verdicts. The trial court thus should not have presumed that the improper contact was prejudicial. When an extrinsic contact relates to legal issues, the presumption of prejudice does not apply, Estrada, 45 F.3d at 1226, and it is the defendant's burden to produce evidence not barred by Rule 606(b) that is sufficient to prove the actual prejudice necessary to justify a new trial, id. at 1225. See also United States v. Olano, --- U.S. ----, ----, 113 S.Ct. 1770, 1780, 123 L.Ed.2d 508 (1993) (describing "ultimate inquiry" as "Did the intrusion affect the jury's deliberations and thereby its verdict?").

[9] Blumeyer and Peckham have not presented evidence sufficient to prove that the foreman's improper

contact resulted in any actual prejudice. The facts of this case are closely analogous to the facts of Estrada. In Estrada, a juror contacted a county public defender and asked whether it was legal for police officers to execute a search warrant without having the document in their possession and without showing the warrant to occupants of the building to be searched. We held that this contact was not prejudicial, in part because the public defender had no knowledge of the facts of the case. Estrada, 45 F.3d at 1226-27. Similarly, there is no showing here that the attorney consulted by the foreman had any knowledge of the facts pertaining to the charges against Blumeyer and Peckham. Moreover, as in Estrada, the District Court here instructed the jury not to consider extraneous information that might come to the jury's attention outside of the trial proceedings. It must be presumed that jurors follow such instructions. Id. at 1227 (citing Francis v. Franklin, 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965, 1976 n.9, 85 L.Ed.2d 344 (1985)). In this case, we need not presume that such instructions were followed; the jurors' admonition of the foreman makes it clear that they were. Given the evidence Blumeyer and Peckham have presented, we conclude that they have not proven any actual prejudice from the foreman's improper comment.

[10] Finally, even if the presumption of prejudice had been warranted in the instant case, we note that the government overcame the presumption by proving that the contact was harmless beyond a reasonable doubt. The District Court correctly stated the objective test that is used to assess whether the extraneous information would likely affect a typical juror when the government must overcome a presumption of prejudice. Mem. & Order at 12 (citing United States v. Simpson, 950 F.2d 1519, 1522 (10th Cir.1991)). The relevant considerations include (1) whether the extrinsic evidence was received by the jury and the

manner in which it was received; (2) whether it was available to the jury for a lengthy period of time; (3) whether it was discussed and considered extensively by the jury; (4) whether it was introduced before a verdict was reached and, if so, at what point during the deliberations was it introduced; and (5) whether it was reasonably likely to affect the verdict, considering the strength of the government's case and whether it outweighed any possible prejudice caused by the extrinsic evidence. See ***1018** Mem. & Order at 12 (citing Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir.1986), and Osborne v. United States, 351 F.2d 111, 118 (8th Cir.1965)).

[11] Despite having correctly stated the test and the relevant factors, the District Court failed to weigh adequately those factors. The court held that "the weight of evidence is merely one factor to consider. Other relevant factors include the fact that the extraneous information was material to Defendants' guilt or innocence, that it came from a lawyer, and that it was available at least to the Foreperson throughout most of the deliberation." Mem. & Order at 14-15. The court's memorandum and order gives no indication that it actually assessed the strength of the government's case and balanced it against the factors tending to show prejudice. Having reviewed the record, we conclude that the evidence of Blumeyer's and Peckham's guilt was overwhelming and outweighs any prejudice that could have been caused by the foreman's improper contact with an attorney.

We also note the District Court's apparent failure to consider other relevant factors that weigh in favor of a finding of harmlessness. At worst the extrinsic information was received by less than half of the jurors and was not discussed or considered by the jury at all. Moreover, the District Court's finding that the contact was material to the

defendants' guilt or innocence is clearly erroneous for the same reason that the finding that the information related to a substantive issue in the case is clearly erroneous. See supra at 1016. No testimony regarding the improper contact suggests that the contact related to the facts of the case. In the circumstances of this case, a complete weighing of the relevant factors, including the government's overwhelming evidence of guilt, results in the inescapable conclusion that the improper contact between the foreman and a lawyer was harmless beyond a reasonable doubt. The District Court erred by concluding that the government had not successfully rebutted the presumption of prejudice.

In sum, we hold that the District Court clearly erred in finding that the foreman's contact with an attorney related to substantive issues in the case and was thus presumptively prejudicial. Even if the extrinsic contact related to a substantive issue, it concerned only a point of law, and the court should not have presumed prejudice. We further hold that Blumeyer and Peckham have not shown that they were actually prejudiced by the contact. Alternatively, the District Court erroneously concluded that the government failed to rebut the presumption of prejudice by proving harmlessness because the court failed to weigh all of the relevant factors and improperly weighed those factors it considered.

For the foregoing reasons, we reverse the order granting Blumeyer and Peckham a
new trial and reinstate the jury's verdicts. The case is remanded to the District Court for sentencing.

HENLEY, Senior Circuit Judge, dissenting.

I respectfully dissent.

As an initial matter, I agree with the majority that this case should be analyzed in accordance with United States v. Cheyenne, 855 F.2d 566 (8th Cir.1988). The jury's exposure, if any, to extraneous information during deliberations may well have been largely confined to that involving a legal issue at trial--the law of conspiracy. Thus, the district court may well have wrongly applied the presumption of prejudice enunciated in Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954).

In Cheyenne, we wrote, "where ... the jury simply supplements the court's instructions of law ... it remains within the province of the judge to determine whether this conduct distorted the jury's understanding of the law to the prejudice of the defendant." Cheyenne, 855 F.2d at 568; United States v. Estrada, 45 F.3d 1215, 1226 (8th Cir.1995). Thus, even though no presumption of prejudice arises under Cheyenne, courts, in their ***1019** discretion, may determine that a defendant has actually been prejudiced sufficiently to warrant a new trial. Cheyenne, 855 F.2d at 568.

Here, the majority determines "Blumeyer and Peckham have not presented evidence sufficient to prove that the foreman's improper contact resulted in any actual prejudice." I disagree, since I do not believe this court can better make that determination.

Determining whether actual prejudice results from an extraneous influence is not a simple black and white proposition since up to a point Fed.R.Evid. 606(b) precludes courts "from investigating the subjective effects of any extrinsic material on the jurors, whether such effects might be shown to affirm or negate the conclusion of actual prejudice...." United States v. Bassler, 651 F.2d 600, 603 (8th Cir.1981), cert. denied, 454 U.S. 1151, 102 S.Ct. 1018,

71 L.Ed.2d 305 (1982). However, a determination of whether a defendant has actually been prejudiced may result from an objective inquiry by the court.[2] See United States

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[2] In a post-trial proceeding Juror 9 testified that during deliberations, she and some other jurors wanted to know whether Blumeyer, alone, could be convicted of a conspiracy. She further testified that a day or two later, the foreman told her and a few other jurors that he had recently talked to an attorney and asked, hypothetically, whether only one co-defendant can be convicted of a conspiracy. In different ways, the testimony of Jurors 4, 10, 11, and 12, as well as the foreman's testimony, corroborated Juror 9's testimony. The majority, in its footnote 1, turns a blind eye toward Juror 9's testimony, deeming it inadmissible under Fed.R.Evid. 606(b). It therefore agrees with the government that "there is no evidence to support the District Court's finding of an extrinsic contact on a substantive matter in this case." I cannot agree with this position. Juror 9's testimony, in my view, is narrowly admissible regarding "the question whether extraneous prejudicial information was improperly brought to the jury's attention, or whether any outside influence was improperly brought to bear upon any juror." Fed.R.Evid. 606(b); see United States v. Krall, 835 F.2d 711, 715-16 (8th Cir.1987) ("a juror may testify to extraneous information or improper influence in the jury room"). Furthermore, since her testimony is admissible, it is clear to me that the jury's deliberations concerning a substantive issue in the case--the law of conspiracy--might have been tainted. Of course, the district court should be allowed to determine, in the first instance, whether the taint, if any, actually prejudiced appellees. Cheyenne, 855 F.2d at 568.

v. Simpson, 950 F.2d 1519, 1522 (10th Cir.1991) ("[t]he inquiry is whether there exists a reasonable possibility that the external influence or information affected the jury"); Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir.1986) (once an extraneous influence on jury deliberations is shown, "a new trial is warranted if there is a reasonable possibility that it could have affected the verdict"); United States v. Brantley, 733 F.2d 1429, 1441 (11th Cir.1984) (reasonable possibility of prejudice to defendant is inquiry if jury exposed to extraneous factual information), cert. denied, 470 U.S. 1006, 105 S.Ct. 1362, 84 L.Ed.2d 383 (1985); cf. United States v. Olano, --- U.S. ----, ---, 113 S.Ct. 1770, 1780, 123 L.Ed.2d 508 (1993) ("ultimate inquiry" is whether the intrusion "affect[ed] the jury's deliberations and thereby its verdict"); Bassler, 651 F.2d at 603 ("[a]ssuming arguendo" that the reasonable possibility test is the proper test). Not only is the inquiry objective in nature, it is also fact intensive. See United States v. Sanders, 962 F.2d 660, 668 (7th Cir.1992) ("[d]etermining whether a verdict was affected is a fact-driven exercise that will depend upon the circumstances of the case"); Bayramoglu, 806 F.2d at 887 (listing the five factors courts should consider when adjudicating extraneous influence cases).

In my view, because the inquiry into actual prejudice is both objective and fact intensive, the district court is better equipped to handle it. We have plainly acknowledged the institutional advantages district courts possess in extraneous influence cases. "We give substantial weight to the trial court's appraisal of the prejudicial effects of extraneous information on the jury, since the trial judge has the advantages of close observation of the jurors and intimate familiarity with the issues at trial." Cheyenne, 855 F.2d at 568; see also Estrada, 45 F.3d at 1226. Other courts, including the Supreme Court, have acknowledged these

advantages as well. See, *1020 e.g., Arizona v. Washington, 434 U.S. 497, 512-14, 98 S.Ct. 824, 834, 54 L.Ed.2d 717 (1978) (in evaluating possible juror bias, the trial judge "is far more conversant with the factors relevant to the determination than any reviewing court can possibly be"); United States v. Bertoli, 40 F.3d 1384, 1393-94 (3d Cir.1994) (discussing the "compelling reasons why the trial court must be given wide latitude to assess and respond to allegations of juror misconduct"); United States v. Sababu, 891 F.2d 1308, 1333 (7th Cir.1989) ("[t]he district court will always be in a better position than the appellate judges to assess the probable reactions of jurors in a case over which he has presided"). Given this deferential standard, I would remand and allow the district court to make an assessment of Cheyenne prejudice. After all, in a case of this kind it is the trial judge who is best in position to decide and the appellate judges are about as important as honorary pallbearers.

Accordingly, instead of reversing and reinstating the jury's verdict, I would remand this case to the district court and allow it to determine, in accordance with Cheyenne, whether appellees were actually prejudiced by the foreman's contact with the outside attorney during deliberations.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. Cause No. 4:93CR68 JCH

ARTHUR A. BLUMEYER, III and
JOHN W. PECKHAM, JR.,
Defendants.

MEMORANDUM AND ORDER

This matter is before the Court pursuant to Defendant John Peckham's post-Trial Motions for a Judgment of Acquittal, New Trial, or Arrest of judgment; Defendant Arthur Blumeyer's Motion for Leave to File Motion and Memorandum; Defendant Blumeyer'S Motion for New Trial Based on Newly Discovered Evidence; a Forensic Medical Center for Federal Prisoners, Report from the United States concerning Defendant Blumeyer's competency; counsel Jane C. Hogan's Motions to Withdraw as counsel for Defendant Blumeyer, and for appointment of a new attorney; Defendant Blumeyer's Motion for Leave to Proceed Pro Se; Defendant Blumeyer's Motion for Return of Property; and motions by Brian A. Blumeyer, Carter C. Blumeyer, Hope P. Blumeyer, and Arthur A. Blumeyer, IV for the return of their automobiles. This Court ordered that most of the foregoing motions and supporting memoranda be filed under seal.

On February 4, 1994, a jury convicted Defendant Blumeyer of 27 counts of mail and wire fraud, conspiracy to commit mail and wire fraud, and money laundering. The

same jury convicted Defendant Peckham of six counts of mail and wire fraud and conspiracy to commit mail and wire fraud. Co-Defendants Dewey Crump and Marvin Lewis were acquitted of all charges. The Court has continued the sentencings for Mr. Blumeyer and Mr. Peckham twice, pending resolution of the instant motions.

MOTIONS FOR NEW TRIAL

On April 15, 1994, Mr Peckham filed Post-Trial Motions for a Judgment of Acquittal, New Trial, or Arrest of Judgment. As grounds for these motions, Mr. Peckham alleges that the jury foreperson engaged in misconduct by speaking with an attorney a the case during deliberations, and discussing that conversation with his fellow jurors. Mr. Peckham also alleges that the Court erred in refusing to sever the Defendants, that the government failed to present sufficient evidence of his guilt on any charge, that his convictions for both mail and wire fraud and conspiracy to commit mail and wire fraud constituted a double jeopardy violation, and that the government failed to prove that he was part of a single, overarching conspiracy- The Court need only address the juror misconduct issue.

Defendant Blumeyer sought leave on July 1, 1994 to file a motion and memorandum on the juror misconduct issue, which he alleges constitutes newly discovered evidence. The Court will grant Mr. Blumeyer leave to file his Notion for New Trial Based on Newly Discovered Evidence of juror misconduct, which he submitted to the Court on July 8, 1994.

Facts Pertaining to Juror Misconduct Issue

Immediately after the verdicts were returned against Defendants Blumeyer and peckham, both Defendants

requested a jury poll. The Court conducted separate polls for Mr. Blumeyer and Mr. Peckham. All jurors concurred with the verdicts against Mr. Blumeyer. Juror #9[3] paused for a long moment before announcing her agreement with the verdicts against Mr Peckham, and she appeared close to tears. However, she clearly stated that the announced convictions were her "true and correct" verdicts.

Juror #9 called Mr Peckham the next day, February 5 1994, to tell him she regretted the verdicts against him. Mr. Peckham directed her to his attorney, Federal Public Defender Lee Lawless, and Mr. Lawless notified the Court of her communications- On February 15. 1994, the court held an in camera interview with Juror #9, Mr. Lawless, and Assistant United States Attorneys James Steitz and Mark Eggert. A transcript of the interview was prepared and filed under seal. (2/15/94 Tr.).

Based on the interview with Juror #9 Mr. Peckham alleged two instances of juror misconduct warranting interviews with the other eleven jurors. (See Deft. Peckham's 3/9/94 Mtn. for Leave to Interview Petit Jurors, and 4/13/94 Reply to Govt's Resp., both filed under seal). First, Mr. Peckham asserted that several jurors interfered with the jury poll by making coercive statements to Juror #9 before she announced her agreement with the verdicts against Mr. Peckham. The Court refused to explore this allegation any further, ruling that the jury poll had been free of coercion and that evidence of intrinsic misconduct among jurors is inadmissible in any event to impeach a verdict. (5/12/94 Mem. and Order, filed under seal).

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[3] The Court has substituted the jurors' numbers, as they were seated at the time of the verdicts, for their names, in order to protect their privacy. The Clerk will file a list of the jurors' names and numbers under seal.

Second, Mr. Peckham alleged that Juror #7, the Foreperson, engaged in misconduct by contacting an attorney and asking him a hypothetical question during jury deliberations. Juror #9 made this allegation during her interview in response to a question from Mr. Lawless regarding any extrinsic misconduct by jurors:

> Q. (By Mr. Lawless): There were a number of questions from the jury about definitions and asking for dictionaries, things like that. Did any of the jurors bring into the jury room or appear to have consulted any outside source for a definition of word or phrase?
>
> A. (By Juror #9): Yes.
>
> Q. What was that?
>
> A. Well this foreman, we were very concerned whether or not, if we convicted Art Blumeyer, did we have to convict -- and I think that we wrote to you O" this question - can we just convict one person here and let everyone else go? I believe it was one of our questions -- I'm Sure it ,,, _- but because we didn't know. We're thinking, trying to figure out you can't have a conspiracy with one person. You need more than one person...
>
> * * * *
>
> So when we got in there, it was either Thursday morning or Friday morning -- I don't remember which one it was -- we were discussing that and [the foreperson]... said that he had, without mentioning what trial it was, or any names, or anything whatsoever, that he had asked an attorney

> friend of his, just on a question of law. Let's say you have this and that kind of conversation, and he told us this and one of the other men in the jury got very upset about it.

(2/15/94 Tr.at 11-12). According to Juror #9 several jurors responded that the Foreperson's contact with an attorney was improper and contrary to the Court's instructions. (Id. at 12, 14). Other jurors were busy getting their coffee and were not paying attention (Id. at 13-14). Juror #9 could not remember any more details, but she stated that the Foreperson's comment was "not important" to her. (Id. at 15).

The Court found that Juror #9 was a credible source, and that she had alleged potentially serious misconduct by the Foreperson. Therefore the Court granted in Part Defendant Peckham's Motion for Leave to Interview Petit Jurors. (5/12/94 Mem. and Order, filed under seal). Every juror besides Juror #9 received a letter from the Court requesting him or her to appear for an interview, and directing each not to discuss jury service in this case with fellow jurors or anyone else except while in chambers. The Foreperson and nine of the remaining jurors were interviewed individually in chambers on June 10 1994, and Juror #10 was interviewed in chambers on June 21, 1994. Counsel for the government and for Defendant Peckham attended the interviews on June 10 and 21; counsel for Defendant Blumeyer attended only the June 10 interview, having not received notification of the subsequent interview. The jurors were sworn prior to their interviews, and the Court asked all of the questions. A transcript of the June 10 and 21 interviews was prepared and filed under seal. (6/10/94 & 6/21/94 Tr.).

The Court first interviewed Juror #7, the Foreperson. The Foreperson denied speaking to an attorney about this case. His exact responses to the Court's questions were as

follows:

> Q. After I instructed you, you heard the closing arguments and you all went back to talk about your decision, did you at any time during those days have a conversation with any attorney about the case?
>
> A. No, not about the case, this case, no. I have had conversations with attorneys, but not about this case.
>
> Q. Did you have conversations with attorneys during those days when the jury was in deliberations?
>
> A. I had conversations with attorneys regarding my business matters, but not regarding this case.
>
> * * * *
>
> Q. All right. So am I correct, you had no conversations with any attorney, or attorneys about this case?
>
> A. That's correct.

(6/10/94 Tr. at 4). The Court dismissed the Foreperson before interviewing the remaining jurors.

Jurors #I #2, #5, #6, and #8 had no memory of the Foreperson telling them he had spoken with an attorney about the case . (6/10/94 Tr. at 7, 9, 18, 20, 21). However, Jurors #3, #4, #10, #11, and #12 corroborated Juror $9's statement that the Foreperson mentioned during deliberations that he had talked with an attorney. (6/10/94 Tr. at 10-11, 12-17, 22-29; 6/21/44 Tr. at 36-38). Several of these jurors

believed that the Foreperson had made such a comment early in the deliberations, perhaps on the first or second day. (6/10/94 Tr. at 16, 23; 6/21/94 Tr. at 36-37).

The jurors had difficulty recalling the subject matter of the conversation the Foreperson related to them. Juror #4 thought that perhaps the Foreperson's conversation with the attorney pertained to "the legality of something" such as working capital and the start-up of a business. (6/10/94 Tr. at 13-14). Juror #11 testified that the Foreperson, "as a businessperson, had posed a question to an attorney "in regards to something that had to do with the case," but she could not remember any details. (Id.at 24). Juror #10 stated that the Foreperson had spoken to a lawyer friend about the case, and that he did not know "if he [the Foreperson] was expressing the lawyer's opinion of something about the case." (6/21/94 Tr. at 37-38). Of the jurors who remembered the Foreperson having described a conversation with an attorney, only Juror #12 denied that the communication pertained to the case. (6/10/94 Tr. at 28-29). Juror #3 could not recall whether the communication related to the case. (Id. at 11)

Counting Juror #9, five jurors characterized the Foreperson as having posed a hypothetical question to the attorney, without having revealed the Defendants' names. Juror #11 stated,

> It was about the case, but he did not relay it to the attorney as though he were talking about the case. He said he posed the question to the attorney without bringing anything into the case. It was like a hypothetical question.

(Id. at 26). Juror #4 similarly testified that the Foreperson's statement

> was about some of the things in the case, but again it was in generalities. When he came back and talked to us, he didn't, hadn't said that he talked about the case, just in general, someone that he knew, and he talked about things in general. Not specific to the case.

(Id. at 14-15). Juror #3 recalled, "It seems like he did discuss things with his attorney, but I asked my attorney about this, or I asked him about that, or what happened if this, but I don't remember him saying specific names...." (Id. at 11). Even Juror # 12, who denied that the Foreperson's statement pertained to the case, recalled him saying that he had posed a "for instance" to an attorney friend, but "it wasn't about this case, but it was, you know, something similar...." (Id. at 28).

Three jurors, including Juror #9, remembered that one or more members of the jury admonished the Foreperson for speaking with an attorney about the case. Juror #11 testified that she told the Foreperson,

> "I thought we weren't supposed to discuss this outside of the deliberation, outside of the fellow jurors," and he said, "I realize that. I'm just asking a question to an attorney, for some information ." He said, "I did not discuss the case with the attorney."

(Id. at 26). Juror #11 also recalled that several other jurors mentioned that they were not supposed to discuss the case outside of the courtroom. (Id. at 27). Juror #10 stated, "I think either myself or maybe one of the other jurors probably spoke up to him and says, 'Hey, you know, we're not talking to nobody about this.' " (6/21/94 Tr. at 37).

Before dismissing the jurors, the Court directed them to refrain from discussing the substance of the interview with

anyone, including fellow jurors.

Defendant Peckham subsequently requested that the Foreperson be recalled to clarify whether he posed a hypothetical question to a lawyer about issues in the case. The Court in its discretion granted the motion. (7/11/94 Order, filed under seal). On July 21, 1994, the Court again interviewed the Foreperson in chambers. Counsel for the government, for Mr. Blumeyer, and for Mr. Peckham attended the interview. A transcript was prepared and filed under seal. (7/21/94 Tr.).

The Foreperson began his second interview by saying, "I don't believe anything was discussed regarding anything I had conversations with attorneys during the deliberation period. Particularly, I don't think it had anything to do with this case. (Id.at 9). Upon further questioning, he clarified that he had spoken with an attorney prior to deliberations about his "rights and obligations" as a "jurist" and potential foreperson, and that he mentioned this conversation to the other jurors during the first or second day of deliberations. (Id. at 9-11). However, he denied telling the jury that he had posed a hypothetical question to an attorney about issues in the case: "Hypothetically we did not discuss this case or a hypothetical case similar to it." (Id. at 13). He denied having any other conversation with attorneys or anyone else about issues in the case. (Id. at 14, 16). He did not recall being admonished by other jurors, but stated that it was possible the other jurors chastised him for speaking with an attorney about the duties of a foreperson. (Id. at 18-20).

The Court finds an irreconcilable discrepancy between the testimony of the Foreperson on the one hand and Jurors #4, #9, #10, and #11 on the other. These four jurors recall the Foreperson stating that he had discussed the case with an attorney. Two jurors testified that the conversation pertained to substantive issues (conspiracy and working capital), which the Foreperson denied. Five jurors recalled

that the Foreperson posed a hypothetical question to a lawyer, which he denied. The Court simply cannot believe that several members of the jury panel misunderstood the Foreperson to be posing a hypothetical question to a lawyer about the case, when in fact he only sought general information on his roles as a juror and foreperson. Based on the totality of the testimony, the Court finds that the Foreperson posed a hypothetical question to an attorney about substantive issues in the case. No other jurors recall the details of such communication; indeed, their admonitions prevented the Foreperson from relating fully the information he had received. The Foreperson and the attorney with whom he spoke would appear to be the only persons with complete knowledge about their conversation, and because the Foreperson denies the conversation, the Court has no access to this information.

Analysis

Rule 606(b) of the Federal Rules of Evidence generally precludes a juror from testifying about statements made during jury deliberations or any juror's mental processes. Rule 606(b) provides an exception, however: "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Once it has been shown that a juror communicated with anyone outside the jury about the case during deliberations, "a presumption of prejudice is created and the burden is an the government to prove harmlessness. United States v. Bassler, 651 F.2d 600, 603 (8th Cir. 1961), cert. denied, 454 U.S. 1151 (1982). See also Remmer v. United States, 247 U.S. 227, 229 (1954) ("The presumption is not conclusive, but
the burden rests heavily upon the Government to establish,

after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.")[4] In order to rebut the presumption of prejudice, the government must demonstrate "beyond
a reasonable doubt that the extrinsic evidence did not contribute to the verdict; in other words, the error must be clearly harmless." United States v. Martin, 960 F.2d 59, 62-63 (8th Cir. 1992)[5]

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[4] Although Remmer preceded Rule 606 (b), the Rule merely codified existing caselaw concerning extraneous influence on a jury. Remmer was one of the Supreme Court's key cases on communication between a juror and a third party. See Government of the Virgin Islands v. Gereau, 523 F.2d 140, 149 & nn. 22, 25 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976).

[5] Some courts articulate this harmless error standard in a slightly different way: reversal is required if there is a "reasonable possibility that the evidence complained of might have contributed to the conviction." Fahy v. State of Connecticut, 375 U.S. 85, 86-87 (1963). See also Bayramoglu v. Estelle, 806 F.2d 880, 887 & n.7 (9th Cir. 1986).

The Court rejects the government's argument that it may rebut the presumption by demonstrating that the extraneous information did not "create a danger of substantial prejudice to the accused." (Govt's Supp. Brief, at 2, citing United States v. Rowley, 975 F.2d 1357, 1363 (8th Cir. 1992); United States v. Hood, 593 F.2d 293, 296 (8th Cir. 1979)). Rowley and Hood are inapposite, because they involve jury misconduct prior to deliberations, when jurors still may be questioned as to actual prejudice.

In meeting its burden to rebut the presumption of prejudice, the government may not inquire whether the extraneous information actually influenced the jurors' mental processes or deliberations. Bassler, 651 F. 2d at 603, citing Fed. R. Evid. 606(b); United States v. Thomas, 946 F.2d 73, 76 n.3 (8th Cir. 1991). Nor may the government rely on evidence of jurors' deliberative processes even if such information is volunteered United States v. Bagnariol, 665 F.2d 877, 884-85 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982). See also United States v. Sieklocha, 843 F.2d 485, 487-88 (11th Cir. 1988) (district court abused its discretion by granting new trial based on juror's affidavit describing his mental processes during deliberations). Rather, using an objective test, the court must assess the likelihood that the extraneous information would affect a typical juror. United States v. Simpson, 950 F. 2d 1519, 1522 (10th Cir. 1991), citing Bassler, 651 F.2d at 603. See also Mayhue v. St. Francis Hosp. of Wichita, Inc., 969 F.2d 919, 923-24 (10th Cir. 1992) (court rarely can assess actual prejudice, because jurors cannot testify as to their mental processes; therefore court must "confirm or rebut the presumption of prejudice by objectively weighing all of the facts and circumstances of the case"). The following factors are relevant to this objective inquiry:

> (1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the extrinsic material was introduced before a verdict was reached, and if so, at what point in the deliberations was it introduced; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the introduction of

extrinsic material affected the verdict.

Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986). Accord Paz v. United States, 462 F.2d 740, 746 (5th Cir. 1972) cert. denied, 414 U.S. 820 (1973). One of the "other matters which may bear on the issue" is the strength of the government's case. Bassler, 651 F.2d at 603, citing Osborne v. United States, 351 F. 2d 111, 118 (8th Cir. 1965).

After careful consideration of the foregoing factors, the Court concludes that the government has failed to sustain its burden. The Court believes that the Foreperson posed a hypothetical question to an attorney about substantive issues in the case, and that he related at least part of this conversation to the other jurors. That most of the other jurors, some five months after their deliberation, could not recall the precise subject matter of the Foreperson's conversation does not undermine their testimony that the conversation pertained to the case. Therefore the court must presume prejudice, and the government has the burden to rebut that presumption. Bassler, 651 F.2d at 603. [6]

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[6] The government argues that no presumption of prejudice attaches to extrinsic evidence which is legal rather than factual in nature. United States v. Cheyenne, 855 F.2d 566, 568 (8th Cir. 1988), does support the government's position. However, the court in Cheyenne relied on United States v. Griffith, 756 F.2d 1244, 1251-52 (6th Cir.), cert. denied, 474 U.S. 837 (1985), which actually held that extrinsic legal information is not per se prejudicial. See also United States v. Duncan, 598 F.2d 839, 866 (4th Cir.) (juror's reference to dictionary not per se prejudicial, following Fifth and Second Circuit precedent), cert. denied, 444 U.S. 871 (1979). This Court

The government attempts to rebut the presumption of prejudice, first by arguing that the jurors could not have been prejudiced by the Foreperson's communications if they could not even recall the subject matter of those communications. (Govt's 7/1/94 Br., at 8). Even if the Court were to rely on the jurors' lack of memory to rebut the presumption as to them, the presumption still would stand as to the Foreperson. "'If a single juror is improperly influenced, the verdict is as unfair as if all were."' United States v. Delaney, 732 F.2d 639, 643 (8th Cir. 1984). Because the Court has discredited the Foreperson's denial that he spoke with an attorney about the substance of the case, his testimony provides no basis for rebutting the presumption of prejudice. If anything, it suggests that the Foreperson may in fact have been prejudiced and is reluctant to share this fact with the Court. Cf. United v. Brantley, 733 F.2d 1429, 1440 (11th Cir. 1984) ("natural inclination" of offending juror would be to deny making prejudicial statements to other jurors), cert. denied, 470 U.S. 1006 (1985).

Second, the government notes that Juror #9 testified

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believes that presumptive prejudice is different from per se prejudice; the former is rebuttable, and the latter is not. The Supreme Court in Remmer, 347 U.S. at 229, and the Eighth Circuit in Bassler, 651 F.2d at 603, did not limit the presumption to extrinsic factual evidence. Furthermore, the Eighth Circuit in Boykin v. Leapley, ___ F.3d ___, 1994 WL 288375 (8th Cir. July 1, 1994), and Bassler itself applied the presumption to extrinsic procedural information, which is more akin to legal information than factual information. In any event, given the record in the present case, the Court is unable to classify the extrinsic information obtained by the Foreperson as clearly factual or legal in nature.

of her own accord that the Foreperson's statement was "not important" to her. (Govt's 7/1/94 Br., at 8-9). Although Juror #9 volunteered this information, the Court cannot consider it under the plain terms of Rule 606(b), because it constitutes evidence of a juror's mental process. Fed. R. Evid. 606(b); Bagnariol, 665 F.2d at 884-85.

Finally, the government focuses on the weight of evidence against Defendants Blumeyer and Peckham. (Govt's 7/1/94 Br., at 9-11; Govt's 8/9/94 Supp. Br., .at 5). However, the weight of evidence is merely one factor to consider. Other relevant factors include the fact that the extraneous information was material to Defendants' guilt or innocence, that it came from a lawyer, and that it was available at least to the Foreperson throughout most of the deliberation. See Bayramoglu, 806 F.2d at 887. The cases cited by the government are distinguishable In Bassler, the jury foreperson improperly consulted Roberts Rules of Order in order to organize the deliberation process; she did not acquire any information regarding substantive issues in the case. 651 F.2d at 601-03. In United States v. Cheyenne, 855 F.2d 566, 568 (8th Cir. 1988), a juror in a murder case engaged in misconduct by reading dictionary definitions of "callous" and "wanton, " but the defendant suffered no danger of prejudice, since the definitions closely paralleled the jury instructions. The court in Bagnariol, 665 F.2d at 884, ruled that a juror's research into the legal status of a corporation involved in the case was "irrelevant to any material issue in the case," and therefore not prejudicial. The evidence before this Court, in contrast, suggests that the Foreperson questioned a lawyer about substantive legal issues (perhaps conspiracy and/or working capital) which were

material to Defendants' guilt or innocence.'[7]

The Court cannot conclude beyond a reasonable doubt that the Foreperson's conversation with the attorney did not contribute to the verdicts against Defendants Blumeyer and Peckham. Martin, 960 F.2d at 62-63.[8] Because the Court is not permitted to inquire how, if at all, the Foreperson's communications actually influenced the jurors' verdicts, the Court has no choice but to set aside those verdicts. Accordingly, the Court will grant Mr. Peckham's Post-Trial Motion for a New Trial, and deny as moot his alternative Motions for a Judgment of Acquittal or Arrest of Judgment. The Court likewise will grant Mr. Blumeyer's Motion for New Trial Based on Newly Discovered Evidence.

The Court will issue a separate Order requiring the Clerk to file a list of the jurors' names and numbers under seal, and to redact all documents pertaining to the juror misconduct issue, so as to substitute the jurors' numbers for their names. In the same Order the Court will require the

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[7] The government also cites United States v. Thomas, 946 F.2d 73, 75-76 (8th Cir. 1991), and United States v. Bollinger, 837 F.2d 436, 440 (11th Cir.), cert. denied, 486 U.S. 1009 (1988), in support of its "weight of the evidence" argument. The Court has difficulty reconciling these cases with Bassler, to the extent they rely on jurors' statements regarding their mental processes during the deliberations. Fed. R. Evid. 606(b); Bassler, 651 F.2d at 603.

[8] Even under the standard of proof advocated by the government the Court finds that the extraneous information acquired by the Foreperson "create(d] a danger of substantial
prejudice to the accused." Hood, 593 F.2d at 296. Accord Rowley, 975 F.2d at 1363.

Clerk to lift the seal on the redacted documents, with the exception of the February 15, 1994 Transcript of Juror #9's in camera interview. That transcript reflects the jurors' deliberative process.

MOTIONS TO WITHDRAW, FOR APPOINTMENT, AND TO PROCEED PRO SE

Defendant Blumeyer's attorney, Jane C. Hogan, has filed two motions to withdraw and one motion for appointment of a new attorney for Mr. Blumeyer. On his own, Mr. Blumeyer filed a Motion for Leave to Proceed Pro Se.[9] In their filings, both Mr. Blumeyer and Ms. Hogan appear to agree that they no longer can work effectively together.

The Court deferred a ruling on these motions until it could determine Mr. Blumeyer's mental competency, an issue raised by Ms. Hogan under seal after trial. The Court granted Ms. Hogan's motion for a psychiatric examination and referred Mr. Blumeyer for a competency examination by the United States Medical Center for Federal Prisoners in Springfield, Missouri. (5/12/94 Mem. and Order, filed under seal). On August 17, 1994, the Court received an exhaustive Forensic Report from David F. Mrad, Ph.D., Clinical Psychologist at the Medical Center. Dr. Mrad determined

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[9] Mr. Blumeyer has submitted numerous pro se motions to the Court. Some of these motions were filed and have been denied without prejudice, since Mr. Blumeyer is still represented by counsel. (6/15/94 Order). Other pro se pleadings have been stamped "received" but not filed as motions. The Court does not anticipate ruling on any of Mr. Blumeyer's pro se motions, except for his Motion for Leave to Proceed Pro Se, as long as he is represented by counsel.

that Mr. Blumeyer was mentally competent, both during and since his trial, to understand the proceedings against him and assist in his defense. Based on Dr. Mrad's report, the Court finds that Mr. Blumeyer is and was at all times relevant to this case legally competent.

The Court will schedule a hearing for 10:30 A.M. on Thursday, September 1, 1994, on the motions to withdraw, for appointment of counsel, and for leave to proceed pro se. Defendant Blumeyer, counsel Jane C. Hogan, and counsel for the government shall attend the hearing.

MOTIONS FOR RETURN OF PROPERTY

On February 14, 1994, Defendant Blumeyer filed a motion seeking the return of any property seized by the government pursuant to Counts XXVII, XXVIII, and XXIX of the Indictment, since he was acquitted of those charges. On July 28, 1994, four members of Mr. Blumeyer's family filed motions seeking the return of their automobiles which were likewise seized by the government. The government has not responded to these motions.

The Court previously denied without prejudice a similar motion by Mrs. Hope P. Blumeyer for the return of her jewelry. (7/12/94 Order). As the Court noted at that time, the government apparently reached an agreement with the Blumeyers in June, 1993, according to which certain seized property would be released following Mr. Blumeyer's trial or plea. Mr. Blumeyer also agreed to relinquish his interest in certain other items, including his family members' cars and jewelry, in proportion to his convictions on the money laundering counts in the Indictment. The Court ruled that the proper time for Mrs. Blumeyer to assert her interest in the jewelry would be after Mr. Blumeyer's sentencing, when the government seeks its forfeiture. 21 U.S.C. § 853(a).

Given the Court's decision to grant new trials to Mr.

Blumeyer and Mr. Peckham, sentencing will not occur for some time, if at all. Because of Mr. Blumeyer's acquittals on some of the money laundering counts, the Blumeyer family may be entitled to the immediate return of any seized property allocable to the acquittals. Therefore the Court will hold the motions for return of property in abeyance and order the government to respond to the motions within ten (10) days.

ACCORDINGLY,

IT IS HEREBY ORDERED that Defendant John Peckham's Post-Trial
Motion for a New Trial [filed under seal on April 15, 19441 is GRANTED, and that his alternative Motions for a Judgment of Acquittal or Arrest of Judgment are DENIED as moot.

IT IS FURTHER ORDERED that Defendant Arthur Blumeyer's Motion for Leave to File Motion and Memorandum [filed under seal on July 1, 1994] is GRANTED.

IT IS FURTHER ORDERED that Defendant Arthur Blumeyer's Motion for New Trial Based on Newly Discovered Evidence [filed under seal on July 8, 1994] is GRANTED.

IT IS FURTHER ORDERED that, based on the Forensic Report on Defendant Arthur Blumeyer from the United States Medical Center for Federal Prisoners [filed under seal on August 17, 1994], Defendant Blumeyer is ADJUDGED LEGALLY COMPETENT during and since his trial in January-February, 1994.

IT IS FURTHER ORDERED that counsel Jane C. Hogan's Motions to Withdraw as counsel for Defendant Blumeyer, and for appointment of a new attorney [first filed on May 2, 1994 and second filed under seal on August 3, 1993] are HELD IN ABEYANCE pending a hearing at 10:30

A.M. on September 1, 1994.

IT IS FURTHER ORDERED that Defendant Arthur Blumeyer's Motion for Leave to Proceed Pro Se [filed on July 27, 1994] is HELD IN ABEYANCE pending a hearing at 10:30 A.M. on September 1, 1994.

IT IS FURTHER ORDERED that Defendant Arthur Blumeyer's Motion for Return of Property [filed on February 14, 1994] is HELD IN ABEYANCE pending a response by the government.

IT IS FURTHER ORDERED that the motions of Brian A. Blumeyer, Carter C. Blumeyer, Hope P. Blumeyer, and Arthur A. Blumeyer, IV for the return of their automobiles [all filed on July 28, 1994] are HELD IN ABEYANCE pending a response by the government.

IT IS FURTHER ORDERED that the government respond within ten (10) days of this Memorandum and Order to the pending motions for return of property.

Dated this 30th day of August, 1994.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 94-3671EMSL

United States of America,
Appellant,

vs.

Arthur A. Blumeyer, III, el al.,
Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestions for rehearing en banc are denied. Judge McMillian and Judge Beam would grant the suggestions for rehearing en banc.

The petitions for rehearing by the panel are also denied.

October 11, 1995

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
FEB 8 1996
CLERK

No. 95-1110

In the Supreme Court of the United States

OCTOBER TERM, 1995

ARTHUR A. BLUMEYER, III, AND
JOHN W. PECKHAM, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
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OCTOBER TERM, 1995

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JOHN W. PECKHAM, JR., PETITIONERS

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing the order of the district court granting a new trial.

1. Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioners were convicted of wire fraud, in violation of 18 U.S.C. 1343 (1988); mail fraud, in violation of 18 U.S.C. 1341 (Supp. V 1993); and conspiracy to commit wire fraud and mail fraud, in violation of 18 U.S.C. 371. Petitioner Blumeyer was also convicted of multiple counts of money laundering, in violation of 18 U.S.C. 1956 (1988 & Supp. V 1993).

On August 30, 1994, the district court granted petitioners' motion for a new trial on the ground of a juror's misconduct in speaking with an outside attorney during deliberations. Pet. App. 16A-35A. The district court first interviewed all of the jurors. Thereafter, relying on *Remmer* v. *United States*, 347 U.S. 227 (1954), the court held that the law required it to presume that the contact was prejudicial to petitioners, and that the government had not rebutted the presumption of prejudice that arose from the juror's contact with the outside attorney.

The court of appeals, in a divided opinion, reversed. Pet. App. 1A-15A. The court of appeals found that there was no evidence to support the district court's finding of an extrinsic contact on a substantive matter in the case, either factual or legal. Accordingly, the court concluded that petitioners were not entitled to a presumption of prejudice based upon the jury foreman's contact with the outside attorney; that petitioners had failed to show actual prejudice arising from the contact; and that even if the presumption of prejudice arose, the government had rebutted that presumption by proving that the contact was harmless beyond a reasonable doubt.

2. Petitioners contend (Pet. 7-12) that the court of appeals failed to follow this Court's decision in *Remmer* v. *United States*, *supra*, in not applying a presumption of prejudice to extrinsic juror misconduct. Petitioners also contend (Pet. 13-17) that the court below did not review the district court's factual findings under the abuse of discretion standard. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision is not a final judgment against petitioners. After the imposition of sentence

by the district court, petitioners can again take an appeal to the court of appeals raising any issues that may be available to them and preserving the claims they have raised here. If the court of appeals affirms their convictions, petitioners will then be able to present their present contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1996

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

Supreme Court, U.S.
FILED
FEB 15 1996
CLERK

(3)

No. 95-1110

In The
Supreme Court of the United States
October Term, 1995

Arthur A. Blumeyer, III and John W. Peckham. Jr.,
Petitioners

v.

United States of America,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY TO MEMORANDUM IN OPPOSITION

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APP

No. 95-1110

In The
Supreme Court of the United States
October Term, 1995

Arthur A. Blumeyer, III and John W. Peckham. Jr.,
Petitioners

v.

United States of America,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The exercise of the Court's review powers at this time is appropriate for several reasons. The issues presented by Petitioners are sufficiently unrelated to and distinct from the underlying prosecution to warrant review at this time. The questions presented by petitioners involve the appropriate analysis to apply when juror misconduct occurs.

Extrinsic juror misconduct strikes at the very

foundation of the criminal justice system. The delay of review by this Court, suggested by the government would result in Petitioners being sentenced and incarcerated, having to pursue their direct appeals, and then possibly several years later, again asking this Court to review the actions of the court of appeals in reversing the district court's granting of motions for a new trial.

Delay is not appropriate in this case. The 1984 amendments to 18 U.S.C. §3731 (The Federal Criminal Appeals Act of 1970) are similar in operation to the provisions of the Bail Reform Act of 1984 18 U.S.C. §3141 et seq. in that both parties, the government and the defendant, are permitted to seek appellate review of detention/release determinations and to seek review of those issues before this Court independent of the progress of the underlying criminal prosecution. See United States v. Salerno, 481 U.S. 739 (1987). A grant of certiorari at this time to review the important questions involved in the analysis performed by the United States Court of Appeals for the Eighth Circuit is appropriate.

This Court clearly has jurisdiction to review the judgement of the Eighth Circuit because the jurisdiction of the Eighth Circuit Court of Appeals was properly invoked. The Conqueror, 166 U.S 110, 113-14 (1897). The Court has granted certiorari to review an important question of law, such as remanding a case for a new trial. United States v. General Motors Corp., 323 U.S. 373, 377 (1945).

For the foregoing reasons, the government should be required to respond on the merits.

Respectfully submitted,

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